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IN THE

Supreme Court of the United States

October Term, 1966

Nos. 462 and 463

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, (No. 462)
STEWART L. UDALL, SECRETARY OF THE INTERIOR, (No. 463)

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent,

PACIFIC NORTHWEST POWER COMPANY; IDAHO FISH AND GAME COMMISSION; IDAHO WILDLIFE FEDERATION; IDAHO PUBLIC UTILITIES COMMISSION; JOHN C. HILL, PUBLIC UTILITY COMMISSIONER OF OREGON; THE STATE WATER RESOURCES BOARD, THE OREGON STATE GAME COMMISSION, AND THE FISH COMMISSION OF OREGON; WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., OREGON WILDLIFE FEDERATION, FISHERMEN'S COOPERATIVE ASSOCIATION, INC., NORTHWEST FISHERIES ASSOCIATION, ALASKA FISHERMEN' UNION, PACIFIC FISH CONSERVATION LEAGUE, MAKAH INDIAN TRIBE,

Respondent Intervenors.

BRIEF OF RESPONDENT INTERVENOR IDAHO WILDLIFE FEDERATION

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CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia affirming the Federal Power Commission dated March 24, 1966 is reported in 358 F2d 840, and printed at

Volume IV Transcript of Record (hereafter IV T.R.) page 372. The decision of the Federal Power Commission opinion No. 418 dated February 5, 1964 granting the license is printed at Joint Appendix Volume II (hereafter J.A. II) page 609. The decision of the Federal Power Commission opinion No. 418-A dated April 30, 1964 denying petition for rehearing and motion to stay is printed at J.A. II 870.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Certiorari was granted November 7, 1966. (IV T.R. 392, 393)

STATEMENT

The Lower Canyon Project designed in connection with the High Mountain Sheep dam, would be located on the Salmon River approximately 3.7 miles above its confluence with the Snake River. Lower Canyon is a concrete arch dam 735 feet high with reservoir 72.8 miles long. (IV T.R. 77. This is higher than the High Mountain Sheep dam at 670 feet located on the Snake River about one-half mile above the mouth of the Salmon River with 58 mile reservoir up the Snake. (IV T.R. 75, 76) The Lower Canyon dam will destroy the Salmon River anadromous fisheries as effectively would Nez Perce dam designed height 720 feet located on the Snake River about two and one-half miles below the mouth of the Salmon River with 61 miles reservoir up the Snake to Idaho Power Company's Hells Canyon project. (IV T.R. 79, 80 J.A. II 613, 614, 615)

The problems of fish passage at such high dams, particularly downstream migration has not been solved nor could be considered solved before proven by several completed four year cycles of chinook Salmon, and in the present state of the art it is not possible to build facilities for fish passage with any assurance that they will be effective. (J.A. II 636, 629 to 641)

According to the record the Columbia River and its tributaries is the greatest producer of Pacific salmon and steelhead trout in the United States, (J.A. II 630) and the Salmon River is the most important of all tributaries, with 75% of the salmon and 74% of the steelhead reaching the Nez Perce site migrate up the Salmon River for spawning. (J.A. II 631)

The Federal Power Commission found that the value of the fish could not be measured alone by the amount spent to take them or the value of the fish as food nor by the economic growth stimulated by sport and commercial fisherman, but the record and contentions of the fisheries' interests make it clear that conservation of the fish is an important public end. (J.A. II 630)

ARGUMENT

LOWER CANYON DAM WOULD BE AS BAD AS NEZ PERCE

Petitioner Washington Public Power Supply System (hereafter Washington Public Power) takes the position that all now agree that the High Mountain Sheep site, not

Nez Perce as initially proposed by them, (J.A. I, 154) is the project best adapted to the comprehensive development of the waterway. The principal reason for this is that the anadromous fishery would be destroyed by the high dam below the mouth of the Salmon River.

However Washington Public Power has failed to take position against the construction of Lower Canyon dam on the Salmon River a few miles above its confluence with the Snake as has been done by Respondent Pacific Northwest Power Company, (hereafter Pacific Northwest Power) and likewise no such position against construction of Lower Canyon dam has been taken by the Secretary of the Interior. This factor is of grave concern to this Intervenor Idaho Wildlife Federation, and warrants its support for affirmance of the license to Pacific Northwest Power for its construction of High Mountain Sheep dam. They have constantly demonstrated good faith toward the biological factors regarding the hydroelectric construction in the relevant reach of the middle Snake River, which cannot be said for Washington Public Power, which got into the competition for the High Mountain Sheep site after Pacific Northwest Power proved that anadromous fish could not yet be successfully passed at such high dams as Nez Perce.

But Washington Public Power was never the less willing to risk the Salmon River fishery by constructing of Nez Perce, and now give no comfort as to Lower Canyon in their plans which are equally as bad as Nez Perce. In contrast it is found that Pacific Northwest Power out of good

faith deference to the fisheries has made record by the testimony of Kinsey M. Robinson, Chairman of the Board of Directors, saying (IV T.R. 25)

> "In our view, this is a case where, most emphatically, the situation justifies delay in construction of Lower Canyon to give further time to develop knowledge and techniques that today do not exist.
>
> "What I have said is against the background of a great deal of study of the area, and a close knowledge of our power requirements. We consider that the Salmon River must be recognized as placed in a unique status in the Pacific Northwest. We think it is proper under the Federal Power act that that status be recognized and that the Commission should regard the Salmon River as a fish sanctuary until there have been tested and proven on other streams methods which will safely pass migrating salmon."

It has been contended by Washington Public Power that it should no longer make any difference to the fish and wildlife interests who builds the High Mountain Sheep project because Nez Perce has been foreclosed, but this is not true, and the record on the Lower Canyon issues illustrates the differences. The true public interest uses to be served under Sec. 10 (a) of the Federal Power Act require that regard for the fisheries in construction of the High Mountain Sheep project is paramount as concerns the Salmon River or the whole value of Nez Perce elimination is lost. Hence it is important which agency builds High

Mountain Sheep dam, and Pacific Northwest Power which cast its lot with the public interest of fisheries by electing against the Nez Perce site, (J.A. II, 653) and in favor of construction above the mouth of the Salmon River where the anadromous fishery was already forced to experimental status for successful fish passage by three high dam licenses for Idaho Power Company, earned the respect of fisheries people as against the cuckoo eggs of Washington Public Power, and the Interior Department.

The importance of the fisheries is not in issue, and is now conceded by all parties. The point is how best to protect, conserve and enhance the anadromous fisheries that are the principal reason for selection of the high dam sites above the mouth of the Salmon River which must not be blocked to salmon and steelhead migration. Pacific Northwest Power should not be denied the opportunity to steer a safe passage between the Scylla and Charybdis argued against by Washington Public Power, as they have demonstrated genuine good faith toward the fisheries which are so crucial to the true public interests involved. This good faith is illustrated not only in seeking the hydroelectric development above the Salmon River, but by their plans to care for the fishery of the Imnaha River above High Mountain Sheep project, (J.A. II 632, 633) employing by pass canal which stands the best chance of success by providing for fish passage under their own power in their own native water.

The decision of the Federal Power Commission granting the license to Pacific Northwest Power (opinion No. 418,

J.A. II, 609) clearly showed which applicant should have the license and is a great landmark precedent in recognition that biology as well as hydraulic head serves the beneficial public uses in a waterway under the jurisdiction of the Federal Power Commission, and Section 10 (a) of the Federal Power Act.

It remains that Washington Public Power is still just trying to dust off the fish as being no issue but we can not forget their record as made in the extensive proceedings leading to this appeal. They should not be able to slyly wedge their way into position of defeating the public values that exist in the quality steelhead and salmon fisheries which are important part of Pacific Northwest culture. Their professed public power image would only be antithesis to the public interests in the fish, and poor exchange.

The decisions appealed from should be affirmed.

DATED: March 20, 1967.

Respectfully submitted

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APPENDIX

Statutes

Federal Power Act, 49 Stat. 683 as amended, 16 U.S.C. 803 Sec. 10 (a).

Sec. 10. All licenses issued under this part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.